Supreme Court, U.S.
FILED
AUG 7 2000
CLERK

NO. 99-1185

IN THE
SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The Question Presented in this case is "[w]hether an otherwise valid civil commitment statute can be divested of its civil nature and held to violate the double jeopardy and *ex post facto* clauses because the administrative agency operating the commitment facility fails to provide treatment and other conditions of confinement mandated by the statute at some time during the individual's commitment."

Only a fraction of Young's brief addresses the question before the Court – the appropriate test for determining the civil versus criminal nature of Washington's Statute. Much of Young's brief ignores this threshold question and argues that the Statute is unconstitutional. Young also focuses on an array of legal issues that are not remotely subsumed within the Question Presented, seeking to modify the judgment below. The Ninth Circuit rejected Young's facial double jeopardy, *ex post facto*, and substantive due process challenges to the Statute, as well as numerous challenges specific to his commitment. Young did not petition (or cross petition) for review of these issues and is barred from raising them. *See Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).

In the remainder of this brief, the State replies to those arguments made by Young that are directed to the Question Presented (Parts I and II). The State then briefly responds to issues not properly before the Court, but discussed at length by Young, lest the State be understood to accede to Young's arguments (Part III).

ARGUMENT

I. Washington's Statute Is A Civil Commitment Law

A. This Case Presents The Threshold Question Of Whether The Civil Or Criminal Nature Of A Statute Is Determined From The Face Of The Law Or "As Applied"

This Court has developed a two-part test to determine whether a particular proceeding or remedy is civil or criminal. First, the Court looks to see whether the Legislature expressly or impliedly labeled the law as civil or criminal. *Hudson v. United States*, 522 U.S. 93, 99 (1997). Second, if the Legislature has adopted the civil label, the Court inquires whether the "statutory scheme" is so punitive, either in purpose or effect, as to transform a civil remedy into a criminal penalty. *Id.* The civil versus criminal inquiry is a threshold question. A Court must first determine whether a law is civil or criminal before it can determine the applicable constitutional limits on the Legislature's authority to adopt the law, such as the double jeopardy and *ex post facto* clauses.

This case presents the narrow but important question of whether the second part of the test is considered in relation to the statute on its face or "as applied". In this context, "as applied" does not refer to the constitutionality of a statute as applied. Rather, it refers to the threshold question of the civil versus criminal nature of a statute and whether the Court considers the application of the statute in that inquiry.

B. *Hudson v. United States* Requires That The Civil Or Criminal Nature Of A Law Be Determined On Its Face, Not "As Applied"

Hudson disavowed an "as applied" approach for determining whether a statute imposes a civil or criminal remedy. Referring to *United States v. Halper*, 490 U.S. 435, 447 (1989), the Court explained, the "second significant departure in *Halper* was the Court's decision to 'assess the character of the actual sanctions imposed'". *Hudson*, 522 U.S.

at 101. The Court in *Hudson* emphasized that, in determining the civil or criminal nature of a remedy, the nonexclusive factors of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), "must be considered in relation to the statute on its face". *Hudson*, 522 U.S. at 100 (quoting *Kennedy*, 372 U.S. at 169). *Hudson* did not announce a new principle in this respect. "This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248 (1980).

Young advances four arguments to avoid the holding in *Hudson*. In the first, he attempts to distinguish *Hudson* from the case at bar. According to Young: "*Hudson* involved only property rights, a subject not contemplated under the *ex post facto* or double jeopardy clauses." Resp. Br. at 31.

Young mischaracterizes *Hudson*. In *Hudson*, the Court applied the two-part test to determine the threshold question of whether the law authorizing the fine was civil or criminal. *Hudson*, 522 U.S. at 99. The double jeopardy clause did not apply because the law was civil. *Hudson*, 522 U.S. at 94. If the Court had concluded that the purpose and effect of the fine was criminal punishment, it would have applied the double jeopardy clause even though only property was involved. *See Department of Rev. of Montana v. Kurth Ranch*, 511 U.S. 767, 783 (1994) (Montana tax on dangerous drugs is characterized as punishment for purposes of the double jeopardy clause).

Another distinction Young asserts is that the Court did not apply the double jeopardy clause in *Hudson* because it was unnecessary in light of other constitutional protections, such as the Eighth Amendment prohibition against excessive civil fines. Resp. Br. at 31-33. The holding in *Hudson* was not based on the Court's passing observation that other constitutional protections may be available. *Hudson*, 522 U.S. at 102-03 ("Finally, it should be noted that some of the ills at which *Halper* was directed are addressed by other constitutional provisions."). Moreover, the Court's observation

that other constitutional protections are available applies equally to conditions of confinement which can be challenged under the due process clause in an action under 42 U.S.C. § 1983. *See infra* p. 11. Young's argument provides no basis for distinguishing *Hudson*, which controls this case.

Young's second argument to avoid *Hudson* is that its rejection of the "as applied" test is inconsistent with other decisions of the Court. According to Young, the Court always considers the constitutionality of statutes as applied. Resp. Br. at 17, 20-23. This argument is not well taken. Whether a statute is civil or criminal is a threshold question that determines the constitutional rules that the statute must satisfy. As the Court observed in *Hudson*, "*Halper* marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature". *Hudson*, 522 U.S. at 100. The civil or criminal inquiry is a separate question from whether the statute satisfies applicable constitutional rules.

Young begins by discussing *Garner v. Jones*, 120 S. Ct. 1362 (2000), the single post-*Hudson* case he cites to support his argument. Resp. Br. at 16-17. *Garner* is inapposite. *Garner* did not involve the threshold question of whether the law was civil or criminal. The law at issue was plainly criminal in nature.

The question in *Garner* was whether a new criminal rule adopted by the Georgia parole board, that retroactively lengthened intervals between consideration for parole, violated the *ex post facto* clause by increasing the punishment for a crime after it was committed. The Court described the legal standard for such a determination as whether the law "creates a significant risk of prolonging respondent's incarceration". *Garner*, 120 S. Ct. at 1368. Because the Georgia parole board possessed significant discretion in considering parole both before and after adoption of the new rule, the Court determined that it was necessary to look at how the change in the law was being applied to determine whether it in fact "creates a

significant risk of prolonging respondent's incarceration". Thus, the particular inquiry and the controlling legal doctrine in *Garner* made the law's administration a necessary and relevant consideration. That is not the case here.

Young also supports this argument with long string-cites in footnotes and a brief discussion of cases such as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Resp. Br. at 21-23 nn.11-18. With the exception of *United States v. Ward*, 448 U.S. 242 (1980), and *Allen v. Illinois*, 478 U.S. 364 (1986), none of these cases address the threshold question at issue in this case of whether the civil or criminal nature of a statute is determined on its face or "as applied". Instead, these decisions go to the subsequent question of whether a civil or criminal law is constitutional as applied. In *Ward*, the Court considered the civil or criminal nature of the statute involved. However, the Court examined the statute on its face, not "as applied". *Ward*, 448 U.S. at 249-50. Thus, *Ward* is consistent with the approach laid out in *Hudson*. *Allen* also does not support Young's argument. *See infra* p. 7.

In *Hudson*, this Court held that the civil or criminal nature of a law is determined on its face, not "as applied". The fact that the Court considers the application of statutes to determine the subsequent question of constitutionality in no way undercuts this Court's holding in *Hudson*.[1]

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[1] Moreover, as the State points out in its opening brief, even if "administrative application" were relevant to the question at hand, Young and the Ninth Circuit fundamentally distort the notion of an "as applied" challenge. Pet. Br. at 18 n.11. Young alleges that he has been subjected to punitive conditions of confinement at the Special Commitment Center (SCC). Such conditions are neither imposed by the terms of Washington's Statute nor within the exercise of discretion that the Statute would allow. Indeed, they would be directly contrary to the Statute's requirement that committed persons are entitled to "adequate care and individualized treatment". Wash. Rev. Code § 71.09.080(2); Pet. App. at 122a; *see United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972)

Young's third argument to distinguish *Hudson* is that the Court always considers the law "as applied" when confinement is involved. The Ninth Circuit also purported to distinguish *Hudson* on this basis. *Young v. Weston*, 192 F.3d 870, 874 n.4 (9th Cir. 1999); Pet. App. at 7a n.4. In our opening brief we explained why the Ninth Circuit was in error. Pet. Br. at 19-23. Young's arguments are similarly flawed. Young offers four cases to support this argument.

Young first cites *Kansas v. Hendricks*, 521 U.S. 346 (1997), and claims that this Court upheld the Kansas sexually violent predator law "only after a careful analysis of the conditions of confinement". Resp. Br. at 15-16. This is not accurate. As we explained in our opening brief, both the majority and the dissent mentioned conditions of confinement including lack of treatment. However, the holding of the majority, and the conclusion of the dissent, focused on the Kansas statute on its face. *Hendricks*, 521 U.S. at 367, 368-69, 383-88; Pet. Br. at 21-22.

Young next discusses *Schall v. Martin*, 467 U.S. 253 (1984). *Schall* involved a due process challenge to a law authorizing pre-trial detention of accused juvenile delinquents. The issue in *Schall* was not the civil versus criminal character of the law. According to Young, the Court found it necessary to consider the conditions under which the juveniles were confined. Resp. Br. at 18. Contrary to Young's claim, although the majority opinion mentioned actual conditions in passing, its analysis focused on the language and operation of the law. *Id.* at 269-71. For example, the Court relied on the fact that the law strictly limited the period of confinement,

(discussing required nexus between an "as applied" challenge and the terms of the statute); *see also Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting) (An "as applied" challenge is one where "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional").

provided for an expedited hearing, and prohibited incarceration of juveniles with adults. *Id. Schall* is consistent with *Hudson*.

Similarly, *Reno v. Flores*, 507 U.S. 292 (1993), provides no support for Young's argument. *Reno* also involved a Due Process challenge to an Immigration and Naturalization Service regulation governing the custody of juvenile aliens. Young claims the Court approved the regulation on its face, but only upon satisfying itself that the conditions of confinement were decent and humane. Resp. Br. at 18-19. In fact, the conditions of confinement were not before the Court because the parties entered into an agreement that settled the claims regarding conditions. This agreement could be enforced in district court. *Reno*, 507 U.S. at 301. Thus, the civil or criminal nature of the regulation did not turn on the conditions of confinement. Rather, if conditions were improper, the district court could order that the conditions be improved.

The last case Young discusses is *Allen v. Illinois*, which concerned a law authorizing the civil commitment of sexually dangerous persons. Young points to the phrase in the opinion it "might well be a different case" if petitioners had shown conditions of confinement essentially identical to that of felons. Resp. Br. at 20. This statement is clearly dicta and, even as dicta, it does not adopt the "as applied" test advocated by Young and the Ninth Circuit. What is significant is that the court did not remand for an evidentiary hearing. Instead, it looked to the requirement of the law that "sexually dangerous persons must not be treated like ordinary prisoners". *Allen*, 374 U.S. at 374.[2]

[2] Young also discusses a decision of the Court of Appeals for the Fourth Circuit, *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964). Resp. Br. at 19. *Sas* challenged a Maryland law establishing a procedure to commit certain convicted criminals to an institution for criminally mental and emotional defectives. Young points out that the Fourth Circuit remanded the case to consider deficiencies in staff, facilities, and finance. However, on remand, when the district court considered whether the law was civil or criminal in nature, it concluded that the law was civil and that the "answer to this question must be determined from the face of the

Finally, Young argues that *Hudson* doesn't apply because, as a matter of substantive due process, "no punishment is permissible under a civil commitment statute". Resp. Br. at 15. In making this argument, Young attempts to skip over the threshold question of whether the Statute is civil or criminal. However, the civil versus criminal inquiry is critical in determining the nature of Young's substantive due process rights and how they are vindicated. If the Statute is civil (as Young's very argument presumes), Young cannot be punished, but his substantive due process right is vindicated through an action under 42 U.S.C. § 1983 to ameliorate the punishment. The facial test of *Hudson* remains the proper analysis to determine whether the Statute is civil or criminal.

This case is controlled by *Hudson*. There is no basis to distinguish *Hudson* from the case at bar. Accordingly, the civil or criminal nature of Washington's Statute must be determined on the face of the law, not "as applied". When the proper standard is employed, "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Young v. Weston*, 192 F.3d at 874.

C. A Facial Test, Not An "As Applied" Test, Appropriately Determines Whether The Legislature Has Enacted A Civil Or Criminal Remedy

Our opening brief explained why the holding in *Hudson* is sound, as applied to this case. First, and most important, the civil versus criminal review is a limitation on legislative power designed to preclude legislative bodies from enacting criminal laws without the attendant constitutional protections. Pet. Br. at 23-24. Only the legislative branch of government is empowered to authorize criminal punishment, and it may do so only by enacting laws. *Schick v. Reed*, 419 U.S. 256, 275

Act". *Sas v. Maryland*, 295 F. Supp. 389, 402 (D. Md. 1969). The staff and facilities issues noted by Young related to an equal protection claim, not the civil or criminal nature of the law. *Id.* at 415-16.

(1974) ("Prescribing punishment is a prerogative reserved for the lawmaking branch of government, the legislature."); *Dowling v. United States*, 473 U.S. 207, 214 (1985) (citing *United States v. Wiltberger*, 5 Wheat 76, 95 (for the "plain principle that the power of punishment is vested in the legislative, not in the judicial department")). As this is so, the appropriate focus for determining whether a law creates a civil or a criminal remedy is the law itself – its purpose and its effect – as expressed by the Legislature in the statute's provisions. Young does not respond to this point.

In this respect, as we explained in our opening brief, the facial approach adopted by *Hudson* is consistent with the language and purpose of the *ex post facto* clause. Pet. Br. at 26. In the context of determining whether a statute imposes a civil or criminal remedy, the *ex post facto* clause serves to check legislative prerogative. Pet. Br. at 26; *Miller v. Florida*, 482 U.S. 423, 429 (1987) ("the reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation").

A second important reason for rejecting the Ninth Circuit's "as applied" test is that it is unworkable. Pet. Br. at 29-30. Since conditions of confinement can change over time, the result of the Ninth Circuit's "as applied" test is that the same law may be civil in one year when adequate treatment is being provided and criminal in another year when it is not. Young argues that this is not a problem because courts are able to distinguish between passing and pervasive unconstitutionality. Resp. Br. at 36. This may be true, but it misses the point, and it does not resolve the workability problems with the "as applied" test. The question in this case is not whether the Statute is constitutional. The question is whether the Statute imposes a civil remedy or a criminal punishment. This threshold question requires a consistent answer, else the constitutional requirements applicable to the

law, including several with a trial or pre-trial focus, will not be known until long after proceedings under the law are complete.

For example, our opening brief explained *Hudson's* rejection of the "as applied" test in favor of examining the law on its face is consistent with the historic purpose of double jeopardy as a pre-trial plea to prevent multiple prosecutions.[3] Pet. Br. at 25. The "as applied" approach allows multiple prosecutions because it is impossible to know how a sanction will be applied until the prosecution is successfully completed and a sanction is imposed. In response, Young argues that the double jeopardy clause prohibits multiple punishments as well as multiple prosecutions. Resp. Br. at 37-38. Young is correct that decisions of this Court hold that the double jeopardy clause prohibits multiple punishments.[4] However, Young's argument again misses the point. The most effective way to prohibit both multiple prosecutions and multiple punishments is to determine the civil or criminal nature of a law prior to the imposition of the sanction. *Hudson* achieves this result.

The Ninth Circuit's "as applied" test is unworkable in a second way. Under it, the constitutionality of procedures set out in the civil commitment law may vary depending on where a person is confined. An example illustrates this point. Assume the Legislature adopted a civil commitment law that provides for psychiatric examination of the person to be committed and requires adequate treatment. However, instead of one institution like the Special Commitment Center (SCC)

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[3] Of course, we do not suggest that the test used to determine whether a law is civil or criminal depends on the underlying constitutional provision at issue. *Hudson*, 522 U.S. at 112 (Souter, J., concurring) ("there is obvious sense in employing common criteria to point up the criminal nature of a statute for purposes of both the Fifth and Sixth Amendments"); *Ward*, 448 U.S. at 254 ("[I]t would be quite anomalous to hold that [a statute] created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes.").

[4] However, Justices Scalia and Thomas have concluded that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment". *Hudson*, 522 U.S. at 106 (Scalia, J., concurring).

there are two. One institution provides adequate treatment, and the other does not. Under Young's "as applied" test, the same law would be civil with regard to one institution and criminal with regard to the other. There is no Fifth Amendment guarantee against self-incrimination under a civil commitment law. *Allen*, 478 U.S. at 368-70. Thus, the psychiatric examination would be constitutional if the person was committed to one institution, but improper if the person was committed to the other. Yet the statute and the Legislature's intent in adopting the law is exactly the same.

Our opening brief also explained the "as applied" test is inconsistent with the duty of the executive branch to faithfully execute the law. Pet. Br. at 27-29. Since *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), the Court has rejected the notion that the executive has the authority to suspend laws enacted by the legislative branch. In this case, the Washington Legislature has enacted a civil law that requires adequate care and individualized treatment. Wash. Rev. Code § 71.09.080(2); Pet. App. at 122a. If an executive agency fails to provide adequate treatment, it cannot transform the legislative intent to adopt this civil remedy into legislative intent to adopt a criminal penalty. Young attempts to distinguish *Kendall* by pointing out that the executive in this case makes no claim of the power to override the law. Resp. Br. at 39 n.26. This statement is true, but it also misses the point. The "as applied" test treats an executive agency's failure to execute the law as though it suspends or alters the intent of the legislative branch, even though the executive agency claims no such power.

II. Young's Recourse For Allegedly Punitive Conditions Of Confinement Is A Challenge To The Conditions, Not A Challenge To The Statute

Young has a remedy to cure inadequate treatment and other conditions of confinement. The remedy is an action under 42 U.S.C. § 1983. If Young succeeds, he would be

entitled to redress, including correction of the unlawful conditions.[5]

Based on what Young characterizes as "intransigence" on the part of SCC defendants in the *Turay* litigation, he argues that an action under 42 U.S.C. § 1983 is not an adequate remedy to rectify unconstitutional conditions of confinement. Resp. Br. at 57-59. Young's argument overlooks several important points.

First, it is not open to dispute in this Court that Young has been properly adjudged to be dangerous and to suffer from a mental abnormality that makes him likely to engage in predatory acts of sexual violence, if he is not constrained. The remedy Young seeks – release pursuant to habeas corpus – would entirely subordinate these constitutional and compelling bases justifying Young's commitment to the conditions of his confinement. Habeas corpus would provide a disproportionate response in circumstances such as these, where the alleged constitutional deficiencies do not taint the bases for

[5] Young argues as though it is established that he has been subjected to punitive conditions of confinement over a period of years. Pet. Br. at 14. However, highly selective findings cited by Young from other litigation do not demonstrate the pervasive or longstanding punitive conditions that Young asserts. *Young v. Weston*, 192 F.3d 874-75, 877; Pet. App. at 8a, 13a. Young also selectively refers to orders in *Turay v. Weston*. Resp. Br. at 6-10. Young's reliance on Turay as establishing punitive conditions of confinement is particularly misplaced. As noted by the district court judge in the *Turay* proceeding, *Turay* does not concern whether conditions of confinement at the SCC are punitive for purposes of the double jeopardy or *ex post facto* clauses. Lodging Of Petitioner (Lodging) at A (Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000 at 9). Turay challenged conditions of confinement at the SCC on several grounds – some similar to those alleged by Young. *Compare* JA at 64-65 to Pet. App. at 8a-11a. Notably, Turay failed in all but one of his allegations – i.e., that the SCC did not provide "access to mental health treatment that gives him a realistic opportunity to be cured or to improve the mental condition for which he was confined", the standard adopted by the district court for measuring the constitutional adequacy of this treatment.

confinement itself and where the alleged deficiencies are otherwise remediable.

Second, the premise of Young's argument seriously understates the magnitude of the effort necessary to comply with the myriad and detailed treatment directives of the 1994 *Turay* injunction and subsequent orders regarding the injunction. These orders and the series of special master's reports in *Turay* repeatedly recognize and reflect the complexity and inherent difficulty of the undertaking.[6] *See, e.g.*, JA at 114, 142; Supplemental Lodging Of Petitioner (Suppl. Lodging) at A (First, Preliminary Report of Special Master at 4). In the best of circumstances, it is a challenging and complex task to construct and successfully administer a model treatment program as ordered by the district court. It is made more difficult when a significant segment of the population resists treatment and works to disrupt treatment efforts. JA at 133; Suppl. Lodging at B (Second Report of Special Master at 3-4; Suppl. Lodging at C (Third Report of Special Master at 6).

Third, the premise of Young's argument gives short shrift to the substantial progress that the SCC has made toward completing compliance with the district court's *Turay* injunction. It is true that the pace of the SCC's efforts has not been uniformly acceptable to the district court, but the injunction proceeding has been characterized by progress and significant improvement in the treatment program at the SCC. JA at 113, 128, 142.[7] The district court has found that

[6] In a Supplemental Lodging Of Petitioner, the State has provided the orders of the district court on the *Turay* injunction, and the series of special master reports to the district court in that matter.

[7] Amicus NACDL errs in asserting that the federal district court judge "has been compelled to enter repeated contempt orders and sanctions on a multiplicity of occasions". Amicus Br. at 12. Prior to November 1999, the district court repeatedly denied requests by the *Turay* plaintiffs to hold the SCC defendants in contempt. Suppl. Lodging at S (Order On Turay's Motion For Further Injunctive Relief And For Order Holding Defendants In Contempt Of Court 11-21-95; Order On Plaintiff's Renewed

"conditions at SCC are far better than they were when the injunction was issued in 1994" and that compliance with the injunction is approaching being "substantially complete". Lodging at A (Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000 at 10).[8]

Finally, Young's argument overlooks the broad powers of the federal courts in remedying violations of federal rights. In *Hutto v. Finney*, 437 U.S. 678 (1979), the Court affirmed a district court's entry of broad injunctive relief in an action under 42 U.S.C. § 1983, challenging cruel and unusual conditions of confinement in an Arkansas prison. The Court explained that "[o]nce invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Hutto*, 437 U.S. at 687 n.9 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). As *Hutto* also makes clear, sanctions necessary to compel compliance with federal court orders are well within the arsenal of the federal judiciary. *Hutto*, 437 U.S. at 690.

Motion For Injunctive Relief And Contempt, And Defendants' Motion For Release From Injunction 4-2-96), T (Order On Plaintiff's Renewed Motion For Injunctive Relief And Contempt, And Defendants' Motion For Release From Injunction 2-4-97; Order On Plaintiff's Renewed Motion For Contempt And Defendants' Renewed Motion For Release From Injunction 10-1-97). Although the district court entered a contempt order in November 1999, it has seen fit to hold in abeyance the payment of sanctions pending further review. Lodging at A (Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000 at 19).

[8] Insofar as Young challenges the adequacy of mental health treatment at the SCC, this most recent finding of the district court would be relevant to his claim. Such a challenge by Young also would have to be considered in light of the fact that Young refuses to participate in treatment. Suppl. Lodging at Z (Order On 1996 Annual Review And Respondent's Motion To Dismiss at 3).

III. Young's Renewed Attacks On The Facial Validity Of The Statute And On His Commitment Are Barred And Fail

As noted at the outset of this brief, Young reasserts numerous claims rejected by the Ninth Circuit that he did not raise in a petition or cross petition in this Court. The Ninth Circuit rejected Young's facial attacks on the Statute, correctly holding that Washington's Statute, like its essentially identical counterpart sustained in *Kansas v. Hendricks*, 521 U.S. 346 (1997), is civil, and that, on its face, the Statute comports with substantive due process. *Young v. Weston*, 192 F.3d at 874, 876-77; Pet. App. at 7a, 12a-13a. Similarly, the Ninth Circuit properly rejected Young's challenges specific to his commitment. *Id.* at 1202; *Id.* at 13a.

Nevertheless, Young seeks to reassert these claims, and in doing so, he seeks to change the judgment entered by the Ninth Circuit. An argument that would modify the judgment below may not be presented unless a cross petition has been filed. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). The Ninth Circuit's judgment remanded Young's "as applied" double jeopardy and *ex post facto* claims for an evidentiary hearing. Young's facial challenges would invalidate the Statute without need of an evidentiary hearing and modify the judgment below. Young's bald assertion that these claims are fairly subsumed in the question presented also is not meritorious. *Yee v. City of Escondido*, 503 U.S. 519, 537-38 (1992) (questions that are merely "related" or complimentary to the question presented are not "fairly included therein"). Although these issues are not properly before the Court, the State briefly responds to them, to avoid any implication of agreement with Young.

Young asserts that "legislative inaction" in remedying objectionable conditions of confinement at the SCC demonstrates the Legislature's punitive purpose in enacting Washington's Statute and negates the law's facial validity

under the double jeopardy and *ex post facto* clauses. Young's argument fails for several reasons, not the least of which is that the facial validity of Washington's law is not before the Court.

However, even if the claim were open, it would lack merit. The Washington Legislature clearly expressed its intent that Washington's law is civil and explicitly provided that persons committed under it are entitled to adequate care and individualized treatment. Wash. Rev. Code § 71.09.080(2); Pet. App. at 122a. Washington's highest court has construed the law as a civil statute primarily concerned with incapacitation and treatment. *In re the Personal Restraint Petition of Young*, 122 Wash. 2d 1, 22 (1993); Pet. App. at 42a. Further, as the following chart depicts, the Legislature has provided substantial and continuously increased funding to implement the Statute's provisions. It is unclear what more Young would require of the Legislature. Certainly, legislative bodies are ill-equipped to undertake the ongoing management of governmental programs and institutions.[9]

* * * * *

[9] Washington has a part-time Legislature. It convenes once a year with a regular session of 105 days in odd numbered years and 60 days in even numbered years. Wash. Const. art. II, § 12. Washington budgets on a biennial basis with a new biennium beginning on July 1st of each odd numbered year. The Legislature adopts a budget for the next ensuing biennium during its session in odd numbered years and makes necessary biennial budget adjustments in supplemental budgets. Wash. Rev. Code §§ 43.88.020(7), .080. The Legislature has made appropriations to implement the Statute in biennial and supplemental budgets. *See infra* at 17, notes 11-16.

FUNDING BY WASHINGTON LEGISLATURE FOR WASH. REV. CODE § 71.09	
BIENNIUM	APPROPRIATION
1989-91	1,614,000[10]
1991-93	4,908,000[11]
1993-95	6,053,000[12]
1995-97	7,576,000[13]
1997-99	15,253,000[14]
1999-01	22,835,000[15]

In addition, in its most recent session, the Legislature made a $14 million capital appropriation to begin construction of new SCC facilities, having a total projected cost of $64 million. 2000 Wash. Laws, 2d Sp. Sess., ch. 1, §§ 205(3), 1013.[16]

[10] 1990 Wash. Laws, 1st Ex. Sess., ch. 16, § 203(g), (h).

[11] 1991 Wash. Laws, 1st Sp. Sess., ch. 16, § 204(3).

[12] 1993 Wash. Laws, 1st Sp. Sess., ch. 24, § 204(3); 1995 Wash. Laws, 1st Sp. Sess., ch. 1, § 204(3).

[13] 1995 Wash. Laws, 2d Sp. Sess., ch. 18, § 204(3); 1996 Wash. Laws ch. 283, § 204(3); 1997 Wash. Laws, ch. 454, § 1104(3).

[14] 1997 Wash. Laws, ch. 149, § 204(3); 1998 Wash. Laws, ch. 346, § 204(3); 1999 Wash. Laws, ch. 309, § 1204(3).

[15] 1999 Wash. Laws, ch. 309, § 205(3); 2000 Wash. Laws, 2d Sp. Sess., ch. 1, § 205(3).

[16] In its first year of operation, 1991, the average monthly population of the SCC was 4 people. Its population has grown over time. In 1998, the last year for which actual average population figures are available, the SCC had an average monthly population of 59. It is estimated that the SCC will have an average monthly population of 108 in the year 2000. Wash. Legis. Budget Notes, 1997-99 Biennium, at 97 (June 1998); Wash. Legis. Budget Notes, 1999-00 Biennium, at 126 (June 1999).

Young next argues that legislative history demonstrates the punitive purpose of the Statute. However, for two reasons, this argument avails Young nothing. First, statutory construction is a component of the facial inquiry into whether a law is civil or criminal for purposes of the double jeopardy and *ex post facto* clauses. As is the case with Young's "legislative inaction" contention, the facial validity of Washington's law, and considerations legislative history that attend such an inquiry, are not before the Court.

However, even if they were, Young's proffered "legislative history" is of particularly dubious value, comprised of selected statements from a gubernatorial task force report and post-enactment legal commentary on Washington's Statute. Resp. Br. at 26-29. The Court has declined to accord any authoritative value to materials having significantly greater nexus to legislative action than the materials offered by Young. *Garcia v. United States*, 469 U.S. 70 (1984).[17]

Young also endeavors to resurrect a facial substantive due process challenge to Washington's Statute, contending that its definition of "mental abnormality" is deficient. This claim also was decided adversely to Young in the Ninth Circuit and drew no petition from Young. *Young v. Weston*, 192 F.3d at 876; Pet. App. at 12a. However, even if the question were before the Court, Washington's definition of mental abnormality is indistinguishable from the definition of "mental abnormality" sustained against attack on substantive due process grounds in *Hendricks*.[18]

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[17] Young also asserts that the review procedures of the Statute are a sham. Resp. Br. at 54, 56. His claim is not borne out by the review process as reflected in his case. Suppl. Lodging at Z (Order On 1996 Annual Review And Respondent's Motion To Dismiss).

[18] Wash. Rev. Code § 71.09.020 defines "mental abnormality' as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others". Pet. App. at 104a. The Kansas statute sustained in *Hendricks* defined "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others". *Hendricks*, 521 U.S. at 352.

Finally, Young challenges one of the specific diagnoses (severe paraphilia not otherwise specified, rape) used as evidence to support the jury's unanimous determination that he suffers from a mental abnormality. Resp. Br. at 44. As with Young's renewed facial challenges to the Statute, this claim also was rejected by the Ninth Circuit and is not properly before the Court. In addition, on Young's direct appeal from his commitment, the Washington Supreme Court recounts at length and appropriately scrutinizes the expert testimony establishing that Young suffers from a mental abnormality. *In re Young*, 122 Wash. 2d at 15-16, 29-30; Pet. App. at 34a-35a, 50a-52a.

CONCLUSION

The Ninth Circuit reversed the decision of the district court in part and remanded for an evidentiary hearing. This portion of the Court of Appeals decision is in error. It should be reversed, and the respondent's Petition for Writ Of Habeas Corpus should be dismissed.

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August 7, 2000